Supreme Court U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1998

BRIAN G. TACKETT,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1899

QUESTIONS PRESENTED FOR REVIEW

1. Does the District Court have subject matter jurisdiction under 18 U.S.C.§844(i) as applied in this case, where the alleged crime is the arson of a church whose congregation resided totally within one state and where the government only proved a "de minimus" affect on interstate commerce?

2. Does 28 U.S.C. 2255 afford the opportunity for collateral review of an instruction when the instruction given by the trial court violated the United States Constitution's Due Process Clause?

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CITATIONS OF REPORTS OF THE OPINIONS ENTERED IN CASE

No opinions in the case have been reported in official or unofficial publications.

STATEMENT OF JURISDICTION

The opinion of the United States of Appeals for the Sixth Circuit was entered on the 6th day of November 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

This case involves 18 U.S.C. 844.(i), the Commerce Clause of the United States Constitution, Article I, Section

8, the 5th Amendment of the United States Constitution and 28 U.S.C 2255.

STATEMENT OF THE CASE

SUMMARY:

The Petitioner was convicted of arson, conspiracy, carrying a firearm in relation to a violent crime and interstate transportation of a stolen vehicle, in relation to the burning of the Barren River Baptist Church in Kentucky in the early morning hours of 6 December, 1991. His conviction was appealed and affirmed. See *United States* v. *Pierce et al*, 62 F. 3d 818 (CA 6, 1995). The Petitioner filed a Motion to Vacate, Set Aside or Correct Sentence, pursuant to 28 U.S.C. Section 2255, based in part on this Court's ruling in *Lopez* v. *United States*, 514 U.S. 549 (1995). This motion and a Certificate of Appealability were denied on 9 April, 1998. A Petition for a Certificate of Appealability was filed with the United States Court of Appeals for the Sixth Circuit and was denied 6 November, 1998. The Petitioner asserts the Barren River Baptist Church was not engaged in interstate commerce within the standard set forth in *Lopez* v. *United States*, *supra*, and therefore, the Federal Court lacked jurisdiction over the alleged offense of burning the church, or conspiracy to burn the church.

STATEMENT:

The evidence established all members who attended Barren River Baptist Church resided in Kentucky. Moreover, the evidence established the ministry programs conducted by the church were for the benefit of Kentucky residents. The only possible activity involving interstate commerce was the purchase of some church supplies from out of state suppliers. The Petitioner argued that the Government had not proven an active involvement in interstate commerce. The Court ruled against the Petitioner under the apparently settled law that the government must

only prove a "de minimis" affect on interstate commerce and accordingly instructed the jury with the same standard that the jury did not need to find any particular degree of affect on interstate commerce.

ARGUMENT

1. Does the District Court have subject matter jurisdiction under 18 U.S.C 684(i), as applied in this case, where the alleged crime is the arson of a church whose congregation resided totally within one state and where the government only proved a "de minimus" effect on interstate commerce?

Lopez v. *United States, supra,* changed the settled law regarding criminal statutes requiring a nexus to commerce. Since *Lopez,* courts must require a more substantial jurisdictional nexus. *United States* v. *Valenzeno,* 123 F3d 365 (CA 6, 1997). This petition raises an "as applied" jurisdictional challenge to 18 U.S.C. §844(i) involving the burning of the Barren River Baptist Church and not a "facial" challenge to the statute. However, see *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S 490, 505 (1979), wherein it was stated, "nonprofit institutions in general . . . . did not affect commerce"). *Lopez* set out three things congress Commerce Clause Power may reach: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) those interstate activities having a substantial connection to interstate commerce. *Lopez, supra,* at 556-61. This Court also clarified that the proper "rational basis test" requires an analysis of whether the regulated activity substantially affects interstate commerce. *Id.,* at 559-61.

As the evidence proved a "de minimis" nexus with interstate commerce the Petitioner was denied a dismissal of the charges and found guilty by the jury upon an unconstitutional instruction, because the Court believed a substantial affect upon interstate commerce was not required under the jurisdictional element of 18 U.S.C. §844(i).

2. Does 28 U.S.C. 2255 afford the opportunity for collateral review of instruction when the instruction given by the trial court violated the United States Constitution's Due Process Clause?

The Trial Court in denying the Petitioner's 28 U.S.C. §2255 motion ruled jury instructions are not subject to attack in a 28 U.S.C. §2255 motion. The Petitioner asserts that an instruction violating the Constitution's Due Process Clause is cognizable under §2255. See *Estelle* v. *McQuire*, 502 U.S. 62, 72 (1991) and *Donnelly* v. *Dechristoforo*, 416 U.S. 637, 643 (1974). In this case, the court's instruction lowered the government's burden of proof on an essential jurisdictional element of the offense. As set forth in *Lopez*, *supra*, the jury and court was required to find a substantial effect on commerce to convict. However, it is true that to challenge an unconstitutional instruction on collateral review the Petitioner must show "cause and prejudice". The cause for Petitioner's failure to object to the instruction at trial, or raise the error on appeal, was the state of the law at that time. Until *Lopez* was decided, the objection would have been held without merit. The prejudice is the continued enforcement of a conviction based upon an incorrect interpretation of the Commerce Clause by the trial court.

The Petitioner did not receive a fair trial and prays this Writ of Certiorari be granted so this wrong can be corrected.

Respectfully submitted,

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